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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO ZUNIGA, Defendant and Appellant.	H034652 (Santa Clara County Super. Ct. No. CC821197)

In the court below, defendant Eduardo Zuniga unsuccessfully moved to suppress evidence. He thereafter pleaded no contest to possession of methamphetamine for sale. The trial court placed defendant on probation for three years conditioned upon, among other things, serving 240 days in jail commencing two months after the sentencing date. It also assessed, among other things, a $150 attorney fee payable to the Public Defender. On appeal, defendant contends that the trial court erred by (1) denying his suppression motion, and (2) assessing the attorney fee. He argues that (1) the evidence implicating him was the product of an unlawful detention, and (2) the evidence was insufficient to support his ability to pay the attorney fee. We disagree and therefore affirm the judgment.

SCOPE OF REVIEW

" ' "An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies

the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

BACKGROUND

Defendant made a de novo motion in the trial court, and the parties developed the historical facts via witnesses and exhibits introduced in evidence. We glean the background from the transcript of the motion hearing.

While patrolling on a September afternoon at 5:00 p.m. in Alviso, San Jose Police Officers Andrew Brown and Timothy Takash saw a car parked on Grand Boulevard. The car was the only one parked on the street, and defendant was alone in the car, sitting in the driver's seat. The officers drove past the car and observed defendant. They drove to the end of the block, made a U-turn, drove back, and parked across the street and opposite from defendant's car. As the officers got out of their car, defendant exited his car and walked back and forth along the car. The officers walked up to defendant and conversationally asked whether he lived in the area. Defendant said he spoke little English and asked to call a friend. Officer Brown said "sure," and defendant called his brother-in-law on his cell phone. A minute later, defendant's brother-in-law came out from one of the homes on the street and joined the group. He affirmed that he spoke English and could translate from Spanish. Officer Brown asked the brother-in-law to ask defendant whether there was anything illegal in the car. The brother-in-law talked to defendant in Spanish and thereafter answered the officers by saying "no." Officer Brown

asked the brother-in-law to ask defendant whether the officers could search the car. The brother-in-law talked to defendant in Spanish and thereafter answered the officers by saying "yes." While Officer Takash stood with defendant and his brother-in-law, Officer Brown searched the car and found nearly 100 grams of methamphetamine.

Defendant claimed in his motion to suppress that the officers detained him, the detention was unlawful because it was not based on reasonable suspicion that he was involved in criminal activity, and the methamphetamine was the product of the illegal detention. The People replied that the contact with defendant was a consensual encounter rather than a detention and defendant therefore consented to the search.

The trial court found the contact to be a consensual encounter: "In this matter, the court is satisfied that this was a consensual encounter. While certain facts may have been lost in translation, the interpreter was a person that was chosen by the defendant."[1]

The parties reiterate their arguments here.

THE SEARCH

"For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police 'contacts' or 'interactions' with individuals, ranging from the least to the most intrusive. First, there are what Justice White termed 'consensual encounters' [citation], which are those police-individual interactions which result in no restraint of an individual's liberty whatsoever--i.e., no 'seizure,' however minimal--and which may properly be initiated by police officers even if they lack any 'objective justification.' [Citation.] Second, there are what are commonly termed 'detentions,' seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police 'if there is an articulable suspicion that a person has committed or is about to commit a crime.' [Citation.] Third, and finally, there are

[1] Defendant's brother-in-law testified that he had told Officer Brown to "go ahead and search" but had "misinterpreted the interpretation."

those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual's liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime." (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.)

Thus, not every encounter between a law enforcement officer and a citizen constitutes a detention for Fourth Amendment purposes. "[S]eizure does not occur simply because a police officer approaches an individual and asks a few questions." (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) Rather, "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." (*United States v. Mendenhall* (1980) 446 U.S. 544, 553.) "[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." (*Florida v. Bostick*, *supra*, at p. 439; accord, *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.)

Here, there is no suggestion in the record that Officer Brown or Officer Takash coerced defendant to submit to questioning "by means of physical force or a show of authority." (*United States v. Mendenhall*, *supra*, 446 U.S. at p. 553.) The officers approached defendant on a public street. Defendant exited his car and remained in the vicinity. The officers asked defendant questions. The defendant provided answers. This scenario shows a consensual encounter that does not implicate Fourth Amendment principles.

Defendant argues that the officers singled him out, appeared suddenly, approached him in full uniform, and immediately began to ask him questions while blocking him from his car. He argues that a reasonable person would not feel free to leave.

But the trial court was not required to accept defendant's interpretation of the facts (the officers' conduct was a show of authority) and could reasonably accept the officers' characterization of the facts (the officers' conduct was conversational). In any event, the facts defendant relies on demonstrate less a show of authority than those in *People v. Perez* (1989) 211 Cal.App.3d 1492, a case in which we rejected a claim that a detention occurred when a police patrol car shined its high beams and spotlights at the defendant's vehicle. "While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention." (*Id.* at p. 1496.)

ATTORNEY FEE

A trial court's authority to order a defendant who has received legal assistance at public expense to pay all or part of the cost is set forth in Penal Code section 987.8: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." (Pen. Code, § 987.8, subd. (b).) "If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county." (*Id.* at subd. (e).)

A finding that a defendant has the present ability to pay is a prerequisite to an order to pay attorney fees under Penal Code section 987.8. " 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable future financial position. Unless the court finds

unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernable future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (Pen. Code, § 987.8, subd. (g)(2).)

A determination that a defendant has a present ability to pay need not be express, but may be implied through the content and conduct of the hearing. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71.) Whether express or implied, the attorney fee order cannot be upheld on appeal unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347.)

Defendant argues that there was insufficient evidence to support the order requiring him to pay the $150 attorney fee.

The People counter that the evidence was sufficient because a finding of ability to pay could be implied from defendant's employment and out-of-custody status for two months after sentencing.

We agree with the People.

At the sentencing hearing, defendant confirmed that he was working at South Bay Service Cubicles. The probation report indicates that defendant earned $10 per hour at this job. Although the trial court ordered defendant to serve 240 days in jail, the trial court acceded to defendant's request to delay his surrender date for the purpose of saving money. From this, it could reasonably have concluded that defendant would have the ability to pay the nominal amount of $150 by working between the sentencing hearing and surrender date. Its attorney-fee order is therefore supported by substantial evidence. Defendant's argument that he earned little, had to support his family, would be incarcerated for eight months, and was assessed other fines and fees is no more than a

reargument of the evidence rather than a demonstration that no substantial evidence supports the trial court's order.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Duffy, J.